

No. 13,444

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

*vs.*

PAPPAS AND COMPANY and FRESH FRUIT AND VEGETABLE WORKERS UNION, LOCAL 78, and FOOD, TOBACCO, AGRICULTURAL AND ALLIED WORKERS UNION OF AMERICA,

*Respondents.*

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## PETITION FOR REHEARING

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*To the Honorable Mathews, Stephens, and Orr, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:*

Respondent, Pappas and Company, respectfully petitions this Court for rehearing following decision rendered herein April 22, 1953.

We must respectfully point out that there has been, in our opinion, a misreading of the evidence in this case, which affects the cornerstone of the opinion.

The Court states that the *Cheney* case (*N. L. R. B. v. Cheney Lumber Co.* (1946), 327 U. S. 385, 388) is not applicable to this case because:

“in reading the evidence in our case, relative to the status of the shed employees, we find evidence that they were furnished by a Contractor.” (Op. p. 5.)

We respectfully submit that a rehearing of the transcript will show no such evidence. The evidence shows that the field picking labor for Pappas and Company was employed by a contractor. The packing shed laborers, however,—the employees involved in this proceeding—were employees of Pappas and Company, and were not furnished by a contractor.

The transcript of the evidence as to contract labor, [Tr. pp. 76-78] reads as follows:

“Q. You say a certain amount of labor is furnished by a contractor? A. That is right.

Q. When does this contractor furnish labor? Is that during the peak season? A. That is during the peak season, the contractor furnishes some employees, is that correct? A. That is right.

Q. And that is when you are growing melons? And what work is done by the contractor? A. Well, the contractor, he does the hoeing, thinning, and cutting weeds and maybe help in irrigation or something like that, a few of the men—

Q. He does the hoeing and thinning, is that it? Who does the picking of the melons? A. He does the picking of the melons, too.

Q. The picking of the melons is done by the employees? A. That is right.

Q. Is that a verbal or written contract? A. That is a verbal contract.

Q. You speak of 75 employees about that time— did you say about 75? A. That is right.

Q. Does that include the 25 you say work there the year around? A. No. In most cases that would be in addition.

Q. That would be in addition to the 75, is that correct? A. Yes.

Q. Then the 70 or 75 employees are employed by the contractor, or are they employed by Pappas and Company? A. They are employed by the contractor.

Q. How is the contractor paid for his work? A. The contractor himself is paid by the day, whereas his help is paid by the hour.

Q. Do you make any payment to his help, or Pappas and Company? A. No.

Q. In other words, you pay the contractor, and the contractor in turn pays his employees, is that correct? A. That is true.

Q. *And they do the actual picking of the melons in field, is that correct?* A. *That is correct.*

\* \* \* \* \*

Q. Do you keep payroll records of each man who is employed by the contractor? A. No, we don't.

Q. What do you mean by checking up? A. Well, just how many men he furnishes for a day.

Q. Who does the hiring and firing of those men? A. The contractor does, with the men.

Q. The contractor himself does, is that correct? A. Yes."

The only work done by the contractor and his employees, as shown by the transcript is work in the fields—hoeing, thinning, irrigating and picking. The evidence shows that the trucking employees, hauling the melons from the fields to the sheds, and the packing shed employees, engaged in sorting and packing the melons at the shed, are employees of Pappas and Company [Tr. pp. 79-81].

More specifically, the evidence shows in regard to packing shed employees:

(a) T. H. Hamilton, the shed foreman, is himself an employee of Pappas and Company [Tr. p. 112].

(b) As shed foreman (and as an employee of Pappas and Company), he hires and fires the shed employees [Tr. p. 112] as contradistinguished from the contractor's employees who are hired and fired by the contractor.

(c) The packing shed employees are paid by Pappas and Company [Tr. p. 91] as contradistinguished from the employees of the contractor, who are paid by the contractor.

(d) The particular shed employee involved in these proceedings, Virgil Ramey, was, by his own testimony, an employee of Pappas and Company, employed by Hamilton, and paid by Pappas and Company check at the time of the alleged unfair labor practice [Tr. pp. 84, 85, 91, 95 and 98].

This Court, in its opinion, states:

“Whether the language of the *Cheney* case has the affect of modifying the *Marshall Field* case, so that we could refuse to enforce the Board's order if upon a review of the evidence we found no evidence to support the implied finding that the employees were non-agricultural . . . we need not decide.”

This statement is premised upon the next sentence of the Court's opinion, that the implied finding that the shed employees were non-agricultural, is, in fact, supported by evidence, namely, that the shed employees were furnished by a contractor, rather than being employees of the farmer, and therefore were non-agricultural. But, if the evidence does not show that the shed employees were furnished by a contractor, then there is no evidentiary support for the implied finding and the *Cheney* case is controlling.

Under these circumstances, we petition the Court to grant a rehearing and, in the light of the *Cheney* case, to determine that there is no evidence to support the implied finding of the Board concerning the non-agricultural status of the employees here involved, and we further petition that this Court refuse to enforce the order of the Board, or, in the alternative, that it remand the case to the Board for further evidence on the implied finding.

Respectfully submitted,

MOSS, LYON & DUNN,

GEORGE CLARK LYON,

*Attorneys for Pappas and Company.*

### Certificate of Counsel.

I, George Clark Lyon, of counsel for Respondent Pappas and Company in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

GEORGE CLARK LYON,

*Attorney for Respondent.*